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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5965

JUNE E. CUNNINGHAM, Administratix,
Petitioner,

v.

COLUMBIA UNION CONFERENCE OF SEVENTH DAY ADVENTISTS, INC., t/a The Hadley Memorial Hospital, and HERMAN I. SLATE, M.D.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are not reported. The United States District Court for the District of Columbia directed verdict for respondents on October 27, 1972.

The United States Court of Appeals for the District of Columbia Circuit affirmed the trial court by judgment entered October 31, 1972. Petitioner's subsequent petition to the Court of Appeals for oral hearing and/or reconsideration and/or a rehearing was denied by order entered November 24, 1972.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the petitioner has raised any special or important reasons for granting the petition?

2. Whether the Court of Appeals violated its own rules by deciding the appeal below without oral argument?

3. Whether in a wrongful-death, malpractice action the trial court was correct in directing verdict for defendants at close of plaintiff's proof?

STATEMENT OF CASE

Petitioner-plaintiff as administratrix sought damages from respondent hospital and respondent surgeon for alleged wrongful death of her husband who was diagnosed by an intern on March 25, 1968 in the emergency room of the hospital as suffering from acute appendicitis, was then referred to and examined at the hospital by respondent Dr. Slate, the surgeon on call, the patient not having a physician of his own, was operated on (appendectomy) later the same evening by Dr. Slate at another hospital, there being no beds available at respondent hospital, and was six days later again operated on (abdominal explora-

tory) by Dr. Slate at the other hospital, immediately after which he died.

Proceedings and disposition below. Jury trial was held on October 22, 26 and 27, 1970, during which petitioner presented nine witnesses and twelve exhibits. These witnesses included petitioner's medical expert as well as respondent Dr. Slate and respondent hospital's emergency room intern and nurse. The exhibits included the hospital record of the decedent's presence at respondent hospital's emergency room and the medical records of the subsequent hospitalization at the second hospital.

On motion at close of petitioner's proof, a verdict for the defendants was directed by the Court. (Appx. 183)[1] The grounds for the ruling were:

> "This Court rules, that as a matter of law, that taking the evidence and interpreting it in the light most favorable to the plaintiff, and giving the plaintiff the benefit of all reasonable inferences to be drawn therefrom, that there is no evidence in which reasonable men and women on a jury could find, (1) What the standards of care in this hospital are, (2) What the standards of care of a surgeon are, (3) That the hospital violated any standards of care, (4) That the surgeon violated any standards of care, or (5) That any negligence of either party, the hospital or the doctor, proximately caused the death of the defendant in this case." (Appx. 184)

The Court further commented:

> "I don't think I have ever had a case where a directed verdict was required as it was in this one." (Appx. 184)

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[1] Records references are to the record before the Court of Appeals below.

Petitioner's statement of facts. Respondents, Hadley Hospital and Dr. Slate, do not accept petitioner's statement at bottom of page 4 of the petition that "the defendant hospital refused to admit the patient for prompt surgery" and "he was ordered transferred to the Jefferson Memorial Hospital." Such conclusions are not warranted by the evidence.[2] Furthermore, petitioner's statement of the case is incomplete.

Stipulation. The parties stipulated as follows:

> "At about 6:20 p.m. on March 25, 1968, John D. Cunningham was examined in its [defendant hospital's] emergency room, that as a consequence of such examination a diagnosis of acute appendicitis was made; that about 7:50 p.m. on the same date Dr. Herman I. Slate was notified; that Dr. Slate soon thereafter appeared at said emergency room and made his own evaluation of the situation and recommended to the patient that he be admitted to Jefferson Memorial Hospital in Alexandria, Virginia, that thereafter on the same evening the patient was admitted to Jefferson Memorial Hospital where surgery was performed for the removal of the appendix by Dr. Slate. Following such surgery various complications developed and additional surgery was performed on April 1, 1968 by Dr. Slate, but he died while being transferred from the operating room to the intensive care room." (Appx. 12, Pretrial Order)

Hospital admission procedure. Admission of a patient to a hospital (as distinguished from emergency room treatment) is only on the authorization of a member of

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[2] The same statement was made in petitioner's brief before the Court of Appeals, at page 6, and objected to as being without evidential support. Petitioner did not respond to the objection.

the medical staff. (Appx. 33, 158-160) The members of the medical staff are not employees of the hospital but are those medical doctors who are privileged to utilize the hospital in taking care of their patients. (Appx. 79, 158-159) Neither the intern nor the emergency room nurse nor the Administrator of respondent hospital was authorized to admit a patient. (Appx. 33, 36, 159) When a person treated in a hospital emergency room requires other than emergency treatment or requires admission to the hospital, the patient's physician is contacted and if he has none, the medical staff physician of the hospital then on call is contacted. (Appx. 32, 110-113, 125)

Dr. Slate's takeover. The decedent advised he had no private physician. (Appx. 35) Therefore, at 7:50 p.m., co-defendant, Dr. Slate, was contacted by telephone because he was then the on-call staff surgeon. (Appx. 32, 117, 125) Dr. Slate arrived at Hadley about 8:15 or 8:20 p.m. (Appx. 118)

Upon accepting the telephone call from Hadley Hospital, Dr. Slate became the attending physician for the patient. (Appx. 34, 159-160) As such, he became the medical doctor responsible for the patient. (Appx. 34, 159) No employee at Hadley Hospital could countermand or change his decisions. (Appx. 160)

Dr. Slate's actions. Dr. Slate examined the patient and diagnosed his condition as acute appendicitis. (Appx. 121) Dr. Slate decided surgery (appendectomy) was indicated but that there was "no urgency" and surgery could be within a few hours. (Appx. 129, 152, 154-155, 157) An immediate operation was not required and the actual surgery about two and one-half hours later was an "early operation." (Appx. 156)

There were no beds available at Hadley Hospital. (Appx. 70, 100) Dr. Slate decided not to operate at Hadley, there being no medical bed to put the patient in after surgery, but to admit him at another hospital. (Appx. 123, 142)

Having "made his own evaluation of the situation," Dr. Slate "recommended to the patient that he be admitted to Jefferson Memorial Hospital in Alexandria, Virginia." (Appx. 12, Pretrial Order) With the patient's assent Dr. Slate ascertained by telephone a bed was available at Jefferson and arranged for admission there. (Appx. 123, 156) This occurred about 8:30 p.m. (Appx. 124)

Surgery and death. The patient was transported to Jefferson by the friend who had driven him to Hadley. (Appx. 53-54) He was admitted there at 9:00 p.m. of the same evening. (Appx. 125, 156)

Surgery was performed at 11:04 p.m., March 25, 1968. (Appx. 126) Surgery was not performed earlier at Jefferson because earlier surgery was not necessary. (Appx. 157)

The appendix was inflamed. (Appx. 127) It was not ruptured. (Appx. 138, 179) The "condition of the patient was good at the end of the operation." (Appx. 83) The "immediate post-operative course was uneventful, and he reacted well from the anesthesia." (Appx. 88) For the first three days "the patient was doing very well." (Appx. 140)

The patient's temperature began to rise and on March 31, 1968, the sixth day, had risen to 106 degrees, and the abdomen was markedly distended. (Appx. 89, 143) This was not in the surgeon's opinion necessarily indicative of an obstruction and often is "a transient thing and the person in nearly all cases recovers from it without any

great ado." (Appx. 143) A second, exploratory operation was performed on April 1, 1968, after which death ensued. (Appx. 135) The cause of death was shock, intestinal obstruction and peritonitis. (Appx. 135)

ARGUMENT

I. THERE EXISTS NO SPECIAL OR IMPORTANT REASON WARRANTING REVIEW BY THE COURT

Petitioner has not presented any "special and important reasons" for review by this Court. Rule 19. Her questions presented consist of routine issues of local negligence principles and trial procedure except for number 5 relating to oral argument.

The trial court directed a verdict for respondents at close of petitioner's (plaintiff's) proof because there was no evidence upon which the jury could find violation of professional duty by either respondent or that the death of the decedent was caused by the negligence of either. (Appx. 184) Upon directing the verdict the trial judge stated:

> "I don't think I have ever had a case where a directed verdict was required as it was in this one." (Appx. 184)

The trial judge (Hart, J.) has been a federal trial judge since 1953.

This Court does not grant a writ of certiorari merely to review the evidence or inferences drawn from it, or to review the sufficiency of evidence for submission to the jury. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273; *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385.

II. APPELLATE AFFIRMANCE WITHOUT ORAL ARGUMENT WAS NOT IMPROPER

Petitioner presents as her question number 5 the issue whether the Court of Appeals violated its own rules by denying opportunity for oral argument. Local Rule 11(e) of the United States Court of Appeals for the District of Columbia Circuit provides:

> "Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such a character as not to justify oral argument, it may, after causing notice to be given by the Clerk to the parties of that determination, proceed to dispose of the case without such argument."

The rule by its language permits the by-passing of oral argument when the court determines the "case is of such a character as not to justify oral argument." The Court of Appeals so determined as set out in its order dated October 25, 1972, copy of which is attached to the petition herein.

Petitioner concedes the power of the appellate court to dispense with oral argument but contends it should not have done so here. However, petitioner presents no authorities supporting the principle implicit in its contentions that an appellate court's discretion to dispense with oral argument has limitations. Instead petitioner contends, *inter alia*, that she had gone to great expense to "prepare briefs" (p. 14). If so, this meant that the appellate court was more thoroughly informed of petitioner's contentions. Nothing could be stated at oral argument which could not have been included in the briefs. The purposes of oral argument are to inform those appellate judges who have not read the briefs and to answer questions of any who have. The court's decision to dispense with oral argument established that the briefs

quite amply informed the court of the issues and authorities.

Petitioner suggests that oral argument can be dispensed with only in appeals which are "frivolous and entirely without merit" (p. 14). She presents no support for the point. It is inconsistent with the appellate purpose of increasing the number of appeals which can be heard "on a written brief but without oral argument."[3] Furthermore, the trial court's comment quoted above and the appellate court's summary affirmance do reflect the lack of merit in petitioner's appeal.[4] This Court should not be called upon to review such determinations.

III. THE DIRECTED VERDICT AT CLOSE OF PLAINTIFF'S PROOF WAS PROPER

Petitioner contends trial error occurred because her medical expert and the registered nurse were not allowed to state their opinions as to the "only remedy for a diagnosis of acute appendicitis" (pp. 11-12). And, she contends further, in any event "expert" answer to that question was not required as "appendicitis is a common ailment with which practically every American family is familiar" (pp. 12-13).

Those contentions became completely moot at trial because petitioner called respondent Dr. Slate as a

[3]"An alternate to be explored is to hear these appeals on a written brief but without oral argument. Some courts have experimented with this, with favorable results." Burger, "The State of the Judiciary – 1971," 57 A.B.A. Journal 855, 858 (Sept. 1971).

[4]Petitioner, after affirmance, submitted to the Court of Appeals a six page "Petition for Oral Hearing and/or Reconsideration and/or A Rehearing" which was denied by order dated November 24, 1972, a copy of which is attached to the petition herein.

witness and he testified that surgery is the only remedy for acute appendicitis. (Appx. 147) Thus, the testimony petitioner sought was given by a defendant and was not in dispute.

Petitioner also contends that it is unnecessary for a plaintiff to prove in a wrongful death case "to a certainty" that the decedent would have lived if he had been operated on promptly (p. 14). No such certainty was imposed. The only evidence not negating causal relationship was the statement of petitioner's medical expert who, although found by the trial court not to be qualified on surgery or hospital procedure, was permitted to state there was "a possibility that he may have lived" if surgery had been performed at respondent hospital. However, when asked if he could state an opinion with reasonable medical certainty, he answered: "I cannot say." (Appx. 177) Petitioner's expert witness also refused to state, when asked by petitioner's counsel, that respondent hospital's treatment of the decedent was not in accord with good hospital practice. (Appx. 177-178) Nor did he state that respondent Slate's treatment was negligent.

The essence of petitioner's case was that negligence necessarily occurred because the intern in the emergency room of respondent hospital diagnosed acute appendicitis, the attending physician who assumed responsibility for the decedent transferred decedent to another hospital for appendectomy (there being no beds available at respondent hospital), and one week later and after a second operation, death occurred.[5]

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[5]The appendix as removed at the first surgery was not ruptured.

But there was no showing that respondent hospital violated any duty or that it was negligent in any way or that its conduct caused the death. Similarly, there was no negligence shown on the part of Respondent, Dr. Slate. The trial court, necessarily, refused to submit the cause to the jury. The Court of Appeals affirmed. It is not appropriate for this Court to review the record in order to decide whether it might substitute its judgment on the sufficiency of the evidence for that of the lower courts.

CONCLUSION

For the foregoing reasons it is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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